No. 15704

IN THE

United States Court of Appeals

for the Ninth Circuit

CANADIAN INDEMNITY COMPANY,

Appellants,

vs.

LEO TACKE,

Appellee.

APPELLANT'S PETITION FOR REHEARING

Appeal from the United States District Court for the District of Montana, Great Falls Division

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Filed ....., 1958

..... Clerk

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APPELLANT'S PETITION FOR REHEARING

To the Honorable Circuit Court of Appeal for the Ninth Circuit:

Appellant respectfully petitions for a rehearing and modification of the opinion filed herein July 3, 1958, upon the following grounds:

I

That facts, material to the decision, were overlooked by the court.

II

The decision is in conflict with controlling decisions. Detailed specifications with statement of Appellant's position with authorities is appended and made a part hereof.

H. B. HOFFMAN
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502 First Nat'l Bank Bldg.

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CANADIAN INDEMNITY COMPANY,

Appellants,

vs.

LEO TACKE,

Appellee.

STATE OF MONTANA
County of Cascade } ss.

Certificate of H. B. HOFFMAN
of Counsel for Appellant

H. B. Hoffman, on his oath, certifies and doses:

That he is of counsel for appellant and makes this certificate for counsel for the reason that he is the person in charge of and most familiar with the facts and circumstances connected therewith.

That in his judgment this petition for rehearing is well founded and that it is not interposed for delay.

H. B. HOFFMAN

Subscribed and sworn to this 17th day of July, 1958.

ORIN R. CURE
Notary Public for the State of Montana
Residing at Great Falls, Montana
My commission expires June 11, 1959

DETAILED SPECIFICATIONS

Facts overlooked that are material to the decision:

1. That this accident happened prior to 8:24 A.M., 20 September, 1952.

Appellant's Exhibit No. 16 (Tr. 211).

This exhibit was a part of the actual police record, positively identified by its content, as covering the accident in question. Part of the record is:

> "Call from: a lady at 8:24 o'clock A.M. Detail: A bad accident north of Feidens Greenhouse."
>
> "S. Swingley"

Leroy Swingley testified that he was a police officer, desk officer and ambulance driver and signed the report. (Tr. 158). He testified, of his own personal knowledged, that:

> "The report was received at 8:24 A.M. on September 20, 1952," that it is the report of this Tacke accident (Tr. 159).

Clarence Fisher testified that he is the police officer who answered the phone when the call came in; that of his personal knowledge the call actually came in at 8:24 (Tr. 161).

Against this official record, Tacke testified that the accident happened "approximately" 8:40 (Tr. 77). On the next page (Tr. 78) on direct examination by his counsel, Tackle testified that the accident occurred at "8:20 September 20th or 8:40."

Mrs. Dusek, who lived nearby the scene, testified the accident occurred "about 8:30." (Tr. 128).

Since time is of the essence, the court's finding that

the accident occurred "about 8:30" requires most critical re-examination. If the phone call (probally from Mrs. Dusek) actually came to the police at 8:24, the accident must have occurred prior to 8:24. Appellee's "slip" in stating the accident happened 8:20 is probably the exact truth.

Montana has adopted the Uniform Official Reports Act. Section 93-901-1 of Montana Codes, a part of the Act, provides:

> "Official reports admissible as evidence. Written reports or findings of fact made by officers of this state, on a matter within the scope of their duty as defined by statute, shall, in so far as relevant, be admitted as evidence of the matters stated therein."

This is in consonance with Title 28, Sec. 1733 U.S.C.A., and in United States vs. N.W. Airlines, 69 Fed. Suppl. 482, the court said, concerning a report of Civil Aeronautics Authority Inspector, admitted in evidence:

> "But this is not an ordinary memorandum. It is an official report made by an employee of the United States in the performance of his duty and the record is one of the official files and records of the United States Government."

Sec. 93-1001-38, of Montana Codes, in force since 1895, provides:

> "Entries made by officers or boards prima facie evidence. An entry made by an officer, or board of officers, or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry."

cf. Smith vs. Armstrong, 121 Mont. 377, 198 P. 2d 795,
McKee vs. Jamestown Baking Co. (Pa.) 198 Fed 2d 551.

Summed up, we have the positive evidence consisting of the police record corroborated by two police officers fixing the time of the accident prior to 8:24 and the testimony of appellee that it was "8:20 or 8:40." Mrs. Dusek places it about 8:30. Mrs. Dusek testifies appellee got out of his car before she telephoned Bison Motors (Tr. 130); Mr. Tacke testifies he was unconscious following the accident and was taken to the hospital in an unconscious state. (Tr. 77). It is trite to say that self interest did not affect the testimony of Mr. and Mrs. Tacke. Under Sec. 93-2001-1 Mont. Rev. Codes, subsection 3, the jury are to be instructed on all proper occasions:

"That a witness false in one part of his tsetimony is to be distrusted in others."

It would seem that the police record fixes the time of accident at 8:20 as Tacke testified (in the alternative).

2. Mrs. Tacke's statement to Mrs. Halverson, 20 September, 1952, in direct response to Mrs. Halverson's inquiry, before the application was accepted, or promise to insure was given, that no accident had happened.

The uncontradicted testimony of Mrs. Halverson (Tr. 168) is:

"Q. (By Mr. Hoffman): Did she (Mrs. Tacke) at that time on that telephone conversation request you to date the policy a day before?

"A. Yes.

"Q. And what did you say to that?

"A. I said, have you had an accident?

"Q. And what did she say?

"A. She said no."

3. Appellee appeared at Kelly's office before noon, Saturday, 20 September, 1952, to report the accident, and stated that the accident happened about 9:30. The policy had been written, but remained in possession of Kelly's agency until sometime after noon when it was placed in a U. S. street mail box directed to appellee. The envelope enclosing the policy is post dated "5 P.M. September 20, 1952" (Tr. 169, and 199, Ex. 7).

4. That appellee's written report of the accident, read over by appellee after it was prepared upon September 24, 1952, in the office of W. D. Hirst, and signed by appellee after he had read it over, stated:

"Date of accident: September 20, 1952. Hour: 9:30 o'clock A.M."

Nowhere in the record is the accuracy of this written instrument as to Mr. Tacke's intended representations questioned (Tr. 202 for Report, 95 for evidence).

THE DECISION IS IN CONFLICT WITH CONTROLING DECISIONS

Where knowledge is possible, one who represents a mere belief as knowledge misrepresents a "fact."

Sovereign Pocohontas Co. vs. Bond
(App. D.C.) 120 Fed. 2d 14;
Pitney Bowes, Inc. vs. Sirkle;
Fidelity & Cas. Co. vs. J. D. Pittman Tractor Co.
(Ala.) 13 So. 2d 669.
Eastern States Pet. Co. vs. Universal Oil Products
Co. (Del. Ch.) 3 Atl. 2d 768;

Restatement 2 Contracts Sec. 470, (1): "'Misrepresentation' means any manifestation by words or other conduct by one person to another that, under the circumstances, amounts to an assertion not in accordance with the facts. . . . .

"b. . . . An assertion of knowledge when knowledge does not exist is an assertion not in occordance with the facts;" etc.

The uncontradicted testimony of Jane Halverson, who accepted Mrs. Tacke's application September 20, is (Transcr. 168):

"Q. (By Mr. Hoffman: Did she (Mrs. Tacke) at that time on that telephone conversation request you to date the policy a day before?

A. Yes.

Q. And what did you say to that?

A. I said, have you had an accident?

Q. And what did she say?

A. She said no."

This evidence amounts to an assertion or representation not in accordance with the facts, an assertion of knowledge when the knowledge did not exist with knowledge and intent that Mrs. Halverson act upon it to issue the policy. That is Mrs. Tacke's obvious purpose and intent. Statement in the court's opinion that Mrs. Tacke did not then know of the collision

has no relevancy; Mrs. Tacke's statement that the accident had not occurred is a misrepresentation of a fact that was obviously material and acted upon by appellant and voids coverage of this accident.

Mrs. Dusek, appellee's witness, gives testimony that she heard the accident, went to the scene, discovered on the back of Tacke's uniform, "Bison Motors" and called Bison Motors who informed her it must be Leo Tacke (Tr. 129). She went back to the car where Tacke "was unconscious sitting in the car for awhile and then he finally got out and that is when I seen Bison Motors on the back of his uniform." Mrs. Dusek restores Mr. Tacke to consciousness before the ambulance that took him to the hospital arrived. Tacke testifies (Tr. 77) that he was taken to the hospital in an unconscious state.

Mr. Tacke left the hospital and appeared at Kelly's office before noon. The policy had been written but was undelivered and in possion and control of Kelly's office. Appellee, himself, in full control and exercise of his faculties, then and there reported the accident, "that it happened about 9:30." (Tr. 169). Thereafter, Kelly's agency deposited the policy in a street mail box addressed to Leo Tacke in an envelope postmarked 5 P.M. September 20, 1952 (Pl. Ex. 7, Tr. 199).

In the oral argument, it was conceded that, notwithstanding much authority that delivery of a policy was a necessary condition to give effect to the contract, under modern practices, acceptance of the ap-

plication, including description of the vehicle, term of insurance, kinds and amounts of insurance, the contract becomes effective from communicated acceptance of the application, with coverage from the hour of acceptance.

We recognized that marine insurance is the noted exception,—and that gradually companies operating fleets of motor trucks, are obtaining "marine insurance." Policies are given the advantage of such coverage with or without the clause "lost or not lost." We feel that this clause insuring property, "lost or not lost" very materially affects claims on a risk actually "lost" when the policy issues, especially antedated policies.

But we never meant to concede coverage under the facts of the instant case, and respectfully submit that the present decision is not supported by the spare authority cited in the opinion to support it. At the head of our opening brief, we cited

Stipich vs. Metropolitan Life Ins. Co.
277 U.S. 311 (Br. 16),

emphasizing the law that all insurance contracts are contracts "uberrimae fidei". In that case, our Supreme Court said, p. 316:

> "But the reason for the rule still obtains, and with added force, as to changes materially affecting the risk which come to the knowledge of the insured after the application and before delivery of the policy. For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is fur-

nishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. If, while the company deliberates, he discovers facts which make portions of his application no longer true, the most elementary spirit of fair dealing would seem to require him to make a full disclosure. If he fails to do so the company may, despite its acceptance of the application, decline to issue a policy, Canning v. Farquhar, L. R. 16 Q. B. Div. 727—C. Ins. Co. 26 Ga. App. 225, 105 S. E. 720, or if a policy has been issued, it has a valid defense to a suit upon it. Equitable Life Assur. Soc. v. McElroy, 28 C. C. A. 365, 49 U. S. App. 548, 83 Fed. 631, 636, 637. Compare Traill v. Baring, 4 De G. J. & S. 318, 46 Eng. Reprint, 941; Allis-Chalmers Co. v. Fidelity & D. Co. 114 L. T. N. S. 433; Compare Piedmont & A. L. Ins. Co. v. Ewing, 92 U. S. 377, 23 L. ed. 610."

Your present opinion cites, as its foundation, the venerable decision of

McLanahan vs. Universal Insurance Co.
1 Pet. (26 U.S.) 170,

wherein the venerated Justice Story says:

"The next point is the omission of Coiron to communicate information of the loss to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract uberrimae fidei, and the principles which govern it are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any facts material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a mani-

fest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the mixim applies, qui facit per alium, facit per se. His own knowledge, in such a case, infects the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the Egnlish as well as the American authorities, and particularly by Watson v. Delafield (2 1 John R. 152; 2 Caines' R., 224; 2 John R. 526), where most of the early cases are collected, and commented upon; and it is well summed up by Mr. Phillips, in his treatise on insurance."

Judgment for defendant was reversed because the trial court usurped the functions of the jury. The cause was sent down for retrial. The above rule of law became the law of the case on retrial.

We do not advocate following Justice Story to the

extent of right to countermanding insurance in the interim between acceptance of the application and delivery of the policy obtained without material misrepresentation. If we must, it is with fear and trembling that we follow, as a rule of law, that an agent's innocence can ever take a case out of our major premise, stated succinctly in Barry et ux vs. Aetna Ins. Co. (Pa. Sup. Ct.) (81 Atl. 2d 551). We respectfully submit that the instant case does not come within the decisions upon which your present decision is based because:

a) Mrs. Tackes assertion, a part of her application, that no accident had occurred, when it is now indisputably agreed by all of us that an accident had already occurred is an assertion not in accordance with the facts. Assertion of knowledge when knowledge does not exist is an assertion not in accordance with the facts.—the most material and relevant fact in this case. The question of Mrs. Tacke's innocence is irrelevant, incompetent, and immaterial.

b) Conceding, as we do, that appellee made the false statement before noon, September 20th that the accident happened at 9:30 after Mrs. Tacke's misrepresentation that no accident had occurred before 9:30 it is nevertheless true that Mr. Tacke's false statement was made first before delivery (mailing) of the policy after noon 20 September, and again in his Report of the accident to appellant September 24th. This Report comes within the intendment and requirements of the policy and dishonesty is not irrelevant.

Does any member of this court believe that Tacke's false statements were not made with intent to de-

fraud? Insofar as delivery of the policy remains a material element of the contract of insurance, his first statement is a flagrant fraud, compounded by the second, because made to reap the benefits of his first fraud, and mistatement of his wife.

We cited and relied upon Strangio vs. Consolidated Ind. Co. 9th C.C.A., 66 Fed. 2d 330 knowing full well that it contains dictum tending against us, an inclination to go full length in applying the maritime liability "lost or not lost" to "automobiles" like "vessels at sea" because we believe the law of insurance will always keep within the realms of honesty and enlightened moral policy. In indulging the presumption that men are honest in their testimony, has this court not completely overlooked the law of evidence that where self-interest is involved (buying a claim for over $5,000.00 for $39.00 in this case) it is a matter of deep concern of the court? True, these are days of fleets of automobiles,—also of telephones everywhere and the Mrs. Duseks who do use them.

> In the Strangio case, you said (66 Fed. 2d 334): "The only contract that arose came into existence when the appellee issued the policy; and, since the policy was issued after the loss, the duty to disclose remained with the appellants."

We press the point of appellee's actual fraud notwithstanding the court's too indulgent stress upon his doubtful state of any continued unconsciousness. And he violated the rule in the case most helpful to appellee, Pendegast vs. Globe & Rutgers Fire Insur-

ance Co. (Ct. App. N.Y.) 159 N. E. 183 that he must "use diligence in communicating the fact of the loss to the prospective insurer so that the insurance may not be written." His statement in Kelly's office, 20th of September, entrapped the insurer in the belief that the loss happened after acceptance of the application, but before delivery.

In both El Dia Co. vs. Sinclair and George A. Moore Co. vs. Eagle Star, cited in the footnote to your opinion, the courts especially note that no question of fraud was presented. Merchants Mutual Insurance, (15 Wall. 664, 82 U.S., 21 L. Ed. 146) considers the dilemma of a parol contract based upon parol evidence and a written policy. If appellee stands upon the written policy, he is barred by the courts ruling, which is:

> "On trial it appeared that the plaintiffs, when they renewed the policy of the 15th January, and paid the premium for insurance, knew that the vessel was lost, and that the defendant had no such knowledge or information. It is obvious from that statement, that no action could be sustained on the policy, and that, in point of fact, the taking of such a policy and causing the defendant to sign it under such circumstances, was a fraud."

United States vs. Patrys, 303 U.S. 341 is hardly anologous. It is based upon the War Risk Insurance act and the amended statute was the controlling feature.

In closing, may we please especially stress;

1. Appellant never intended to insure, nor does the policy by its terms insure, "loss or no loss."
2. This application was accepted and the policy was drawn in Kelly's office upon the representation of, and inducement by Mrs. Tacke that no loss had then occurred.
3. Tacke's intended fraud is, in law, actual fraud in his statements 20 September, before noon, before delivery of the policy and Report of accident 24 September that the accident happened 9:30.

While the authorities are split in general insurance decisions as to whether material misrepresentations must be fradulently made (45 C.J.S. p. 173), the author (45 C.J.S. p. 548) states the marine insurance law on this point as follows:

> "Intent. In marine insurance, contrary to the general rule applicable to other kinds of insurance discussed supra § 473 (3), any omissions to communicate a material fact which insured is under an obligation to disclose will vitiate the policy whether such omission is intentional or results from mistake, accident, forgetfulness, or inadvertence; and fraud is not necessary." (cf. Sec. 647, p. 552 of 45 C.J.S.)

May we please suggest that the case should be reheard in banc. We respectfully submit that Mrs. Tacke's misrepresentation that no loss had occurred when she put in the application is obviously material, if not an implied warranty; that Tacke's false statement that the loss actually occurred after the applica-